IN THE

Supreme Court of the United States

October Term, 1943.

No. 483.

CLIFFORD F. MacEVOY COMPANY and THE AETNA CASUALTY AND SURETY COMPANY,
Petitioners,

AGAINST

UNITED STATES OF AMERICA for the Use and Benefit of THE CALVIN TOMKINS COMPANY,
Respondent.

BRIEF FOR RESPONDENT.

BENJAMIN P. DeWITT,
Counsel for Respondent,
423 Center Street,
South Orange, New Jersey.

SIDNEY PEPPER,
Of Counsel.

INDEX.

TABLE OF CASES CITED.

TABLE OF STATUTES CITED.

OTHER AUTHORITIES CITED.

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 483.

CLIFFORD F. MACEVOY COMPANY and THE AETNA CASUALTY AND SURETY COMPANY,

Petitioners,

AGAINST

UNITED STATES OF AMERICA for the Use and Benefit of THE CALVIN TOMKINS COMPANY,

Respondent.

BRIEF FOR RESPONDENT.

Opinions Below.

The opinion of the District Court of New Jersey (R. 8-14) is officially reported at 49 F. Supp. 81. The opinion of the Circuit Court of Appeals for the Third Circuit (R. 22-29) is officially reported at 137 F. 2d 565. The order of this Court granting petitioners a writ of certiorari (R. 45) is not yet officially reported.

Basis for Jurisdiction.

Jurisdiction is invoked by petitioners under Section 240(a) and Subsection 8(a) of the Judicial Code, as amended, 28 U. S. C. Sections 347 and 350, and the order of this Court, dated December 13, 1943 (R. 45) granting petitioners' petition for a writ of certiorari.

Statement of the Case.

This is an action on a bond given pursuant to the Miller Act, 49 Stat. at L. 793, 794, 40 U. S. C. A., §270a-d (printed as Appendix A to Respondent's Brief, pp. 36 to 39), brought in the United States District Court for the District of New Jersey against a contractor who contracted with the United States of America to construct a defense housing project at Linden, New Jersey, and the surety of the contractor (R. 3-4).

The allegations of the complaint which, on the motion to dismiss, are to be taken as proved, show that on June 3, 1941, defendant Clifford F. MacEvoy Company (MacEvoy), petitioner herein, entered into a written contract with the United States of America represented by the Federal Works Administrator, under which MacEvoy agreed to furnish the material and perform the work necessary for the construction of 700 dwelling-units in the housing project (R. 3-4).

Pursuant to the Miller Act, MacEvoy, as principal, and The Aetna Casualty and Surety Company (Surety), petitioner herein, as surety, furnished a bond, conditioned for the prompt payment of all persons supplyng labor and material in the prosecution of the work provided for in MacEvoy's contract (R. 4, 16-17).

MacEvoy thereafter contracted with James H. Miller & Company (Miller Company) for the furnishing of building material by the Miller Company for the prosecution of the work provided for in MacEvoy's contract (R. 5).

The Miller Company in turn contracted with the use plaintiff, The Calvin Tomkins Company, respondent herein, to furnish building material for the prosecution of the said work (R. 5).

Respondent, with the knowledge, consent and approval of MacEvoy, furnished $47,119.14 of building material through the Miller Company for the prosecution of the

said work. Respondent received from the Miller Company $35,085.65 on account, leaving a balance of $12,033.49 with interest owing (R. 5).

The Miller Company failed to pay respondent the balance. Respondent duly notified MacEvoy and the Surety, in accordance with the statute, within 90 days after it furnished the last of the material, of the amount of its unpaid claim (R. 6). Thereafter, and prior to the expiration of one year after the final settlement of MacEvoy's contract for the said work, respondent brought this action against MacEvoy and the Surety on their bond to recover the balance owing for the material furnished in the prosecution of the work under MacEvoy's contract with the United States of America (R. 6).

There is nothing in the complaint to show what, if anything, MacEvoy paid its subcontractor, the Miller Company (R. 3-6). Respondent, going outside of the allegations of the complaint, offered to the District Court the affidavit of an employee of MacEvoy to the effect that MacEvoy paid the Miller Company in full for all material furnished by the Miller Company (R. 18). Payment is disputed, contrary to petitioners' statement (Brief, p. 2), and will be an issue of fact at the trial.

Defendants (petitioners herein) moved on May 4, 1942 to dismiss the complaint on the ground that it failed to state a valid cause of action (R. 7).

In a memorandum opinion filed March 17, 1943, United States District Judge Fake granted petitioners' motion (R. 8). An order and decree dismissing the complaint was made and entered on April 5, 1943 (R. 15).

Respondent appealed from the order and decree of the District Court to the United States Circuit Court of Appeals for the Third Circuit.

In an opinion filed August 13, 1943, the Circuit Court of Appeals reversed the judgment of the District Court

(R. 22). On the same day, an order of the Circuit Court of Appeals reversing the judgment was made and entered (R. 30).

On September 20, 1943, the Circuit Court of Appeals denied petitioners' motion for a rehearing (R. 43).

By order dated December 13, 1943, this Court granted petitioners' petition for a writ of certiorari (R. 45).

Question Presented to This Court.

The question presented is: May respondent recover from a contractor with the United States of America pursuant to the Miller Act for material furnished by respondent in the prosecution of public work of the United States through another company which had entered into a contract with the contractor to furnish the material?

This case does not involve the right to recover of "the remotest claimants" or of "indefinite and indeterminate classes of claimants" as petitioners suggest (Brief, p. 5).

Summary of Argument.

The title and the text of the Miller Act state clearly that the Act protects all persons furnishing labor and material in the prosecution of public work.

The Circuit Court of Appeals properly held that the proviso in the second section of the Act relating to notice to the contractor and the procedure for giving such notice should not be so construed as to nullify the express provisions of the Act, including the express provision of the second section in which the proviso appears, that all persons furnishing labor and material are protected by the contractor's bond.

The bond given by petitioners, on which this action was brought, states clearly that it is for the protection of all persons supplying labor or material in the prosecution of the work.

Even if the Miller Act had expressly provided, as it does not, that only those persons who have furnished labor or material to the contractor or a subcontractor may recover on the bond, respondent which furnished material in the prosecution of public work through the Miller Company which had a contract with MacEvoy, the contractor, would be entitled to recover under the liberal construction given by this Court to the Heard Act and the Miller Act, as well as under the construction given by the courts of numerous states to similar statutes.

The Heard Act, which was repealed and superseded in 1935 by the Miller Act, provided that all persons supplying labor and material to the *contractor* in the prosecution of public work were entitled to recover on the contractor's bond. This Court, in construing the Heard Act, has held that all persons furnishing labor or material in the prosecution of the public work, even though not furnished directly to the contractor, were entitled to recover on the contractor's bond. This Court, in construing the Heard Act, has also held that a proviso in the Heard Act would not be so construed as to nullify the express provisions of the Act.

The Circuit Court of Appeals for the Ninth Circuit, in construing the Heard Act, held that a claimant which had supplied material to the vendor of material to a subcontractor was entitled to recover on the contractor's bond. This Court denied a petition for a writ of certiorari in that case.

This Court has held that the Miller Act is a substitute for the Heard Act and enlarges the protection given under the Heard Act to those furnishing labor or material in the prosecution of public work. The Circuit Court of Appeals properly refused to hold that the Miller Act narrows and restricts the protection which this Court has held is given under the Heard Act to all persons furnishing labor or material in the prosecution of public work.

This Court's liberal construction of the Heard Act has not resulted in, and the Circuit Court's similar construction of the Miller Act will not result in, the consequences feared by petitioners.

POINT I.

The title and the text of the Miller Act state clearly that the Act protects all persons furnishing labor and material in the prosecution of public work.

Petitioners would have the Court believe that the Miller Act "by clear and unambiguous language, precludes recovery by respondent" (Brief, p. 6). The fact is that the title and the text of the act in the plainest language permit recovery by respondent; and it is only by what the Circuit Court describes as "torturing the meaning" (R. 29) of a proviso in Section two of the Act that petitioners are able to raise any question at all.

The purpose of the Miller Act is indicated in the title of the Act as follows:

> "An Act Requiring Contracts for the Construction, Alteration, and Repair of Any Public Building or Public Work of the United States to Be Accompanied by a Performance Bond Protecting the United States and by an Additional Bond for the Protection of Persons Furnishing Material and Labor for the Construction, Alteration or Repair of Said Public Building or Public Work" (Appendix A, p. 36).

The Miller Act consists of five sections (Appendix A, pp. 36-39).

The first section (§270a) requires the contractor for a public building or public work of the United States to fur-

nish "a payment bond with a surety * * * for the protection of *all* persons supplying labor and material in the prosecution of the work provided for in said contract for the use of *each* such person" (Subdivision [a][2]; italics supplied). There is no qualification or restriction on the persons for whose protection the bond is furnished except that they must have supplied labor or material in the prosecution of the public work.

The second section (§270b) provides in part that "*Every* person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under Section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him" (Subdivision [a]; italics supplied). Again, there is no qualification or restriction except that the person must have supplied labor or material in the prosecution of the work.

The third section (§270c) provides that *any* person who has supplied labor or material for such work and who has not been paid may, upon making an affidavit to that effect, obtain a certified copy of the bond of the contractor and the contract for which the bond was given. Again, there is no qualification or restriction except that the person must have supplied labor or material in the prosecution of the work.

The fourth section (§270d) defines certain terms used in the Act.

The fifth section provides for the repeal of the Heard Act, 28 Stat. at L. 278, 33 Stat. at L. 811, 36 Stat. at L.

1167, 40 U. S. C. A., §270 (printed as Appendix B to Respondent's Brief, pp. 40-42).

Thus, as the Circuit Court said herein:

> "* * * the only limitation placed upon admission to the class of persons who may recover on the contractor's bond in the Act itself is that they must have 'furnished labor or material in the prosecution of the work'. Surely plaintiff's credentials as presented in its complaint entitle it to the protection of the Act within a literal reading of the statute" (R. 24).

Immediately following the provision quoted above from the second section (§270b), there is a proviso as follows: "*Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelop addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States Marshal of the district in which the public improvement is situated is authorized by law to serve summons."

Petitioners asked the Circuit Court of Appeals to find that this proviso in effect amended the other sections of

the Act, including the second section, in which the proviso appears, so as to limit recovery on the bond to persons furnishing labor or material directly to the contractor or a subcontractor (defined technically as one under contract to perform work at the site).

Nowhere in the Act is there any provision that only those persons who have furnished labor or material directly to the contractor or subcontractor may recover. The word "subcontractor", in fact, is not found elsewhere in the Act. The language of the Act throughout indicates plainly that the test of the right to recover on the contractor's bond is whether claimant has furnished labor or material in the prosecution of the public work.

The proviso does not state, as petitioners argue, that only those persons may recover who have furnished labor or material directly to a contractor or a subcontractor. The proviso merely states that persons furnishing labor or material through a subcontractor are required to give notice to the contractor within a limited period before commencing suit on the bond. Respondent has given such notice (R. 6).

The language of the proviso itself indicates that there was no intention to limit recovery to persons furnishing labor or material to a contractor or subcontractor. The proviso states that the claimant, in giving notice, must set forth "the amount claimed and the name of the *party* to whom the material was furnished or supplied or for whom the labor was done or performed." (Italics supplied.) If it had been the intent to limit recovery by the proviso to claimants furnishing material to the contractor or a subcontractor, the proviso would have required that in the notice to be given to the contractor, the name of the *subcontractor*, not the name of the *party* to whom the material was furnished, be stated.

As the Circuit Court said herein:

> "* * * obviously, this provision is not an *exception*, which exempts absolutely from the operation of a statute. The provision is essentially an *explanation*—to make clear (what was not clear under the prior Heard Act) that the absence of direct contractual relationship with the general contractor should not defeat actions on the payment bond. Thus, the underlying idea of the provision was to extend (rather than to restrict) the ambit of the Miller Act" (R. 28).

This Court, in construing the proviso, has stated that it is a "condition precedent to the right to sue", and not that it is a limitation on the persons protected by the Act, as petitioners contend it is (Brief, pp. 6, *et seq.*).

> *Fleisher Engineering & Construction Co.* v. *U. S. for Use of Hallenbeck*, 311 U. S. 15, 18, 85 L. ed. 12, 15 (1940).

Petitioners, however, after amending the proviso so as to provide that only those persons furnishing labor or material directly to a contractor or subcontractor may recover on the bond, contend that the proviso as thus amended is not "inconsistent" with the broader terms which precede it", *i. e.*, the sections of the Act which provide that *all* persons furnishing labor or material in the prosecution of the public work may recover on the bond without qualification or restriction (Brief, p. 10).

Petitioners, having argued that the proviso amends the plain provisions of the Act, go on to argue that respondent cannot recover, although it supplied material under a contract with the Miller Company (which in turn had a contract with MacEvoy), because the Miller Com-

pany was not a subcontractor in the narrow, technical sense in which petitioners insist the term must be understood. Petitioners define a subcontractor as a person who performs, at the site, part of the work called for by the contract (Brief, p. 27).

Having in mind the purpose of the Act as expressed in its title and the broad provisions of the body of the Act, as well as the language of the proviso itself, it cannot be said that Congress used the word "subcontractor", as petitioners argue, in the narrow, technical sense of a person who performs, at the site, part of the work called for by the contract.

The Circuit Court concluded that:

> "* * * every effort should be made by us to give to the word 'subcontractor', in this setting, a broad, general (rather than its narrow, technical) denotation" (R. 28).

The word "subcontractor" has been widely used in the sense of one who has a contract for labor or material with the contractor.

This Court in a case construing the Heard Act used the word "subcontractor" several times in its opinion in referring to a materialman which had a contract with the contractor to supply bricks.

> *United States Fidelity & Guaranty Company* v. *United States for the use and benefit of Golden Pressed & Fire Brick Company*, 191 U. S. 416, 417, 425, 426, 48 L. ed. 242, 246, 247 (1903).

In the present case, the Miller Company which had a contract with the contractor to supply wallboard is in exactly the same situation as the brick company in the

case just referred to and would, therefore, be considered a subcontractor.

The United States Court of Appeals for the Indian Territory in *Campbell & Williams* v. *William Cameron & Co.*, 5 Ind. Ter. 323 (1904), held that a materialman who furnishes lumber to a contractor is a subcontractor.

In *Western Sash & Door Co.* v. *Buckner*, 80 Mo. App. 95 (1899), the Court defined the word "contractor" to include one who furnishes material only and the word "subcontractor" to include one who furnishes material under a contract with the contractor. The Court said:

> "One who furnishes materials to an original contractor under a contract with him, under the statute is as much a subcontractor as if he furnished labor alone, or both labor and materials. The practical construction given the statute by the Appellate Courts of this state in a great number of cases has been to the effect that whether one furnishes material or labor, or both, under a contract with the original contractor, he has been alike regarded as a subcontractor entitled to a lien" (p. 100).

In *Mobley* v. *Leeper Bros. Lumber Co.*, 89 Oklahoma 95 (1923), the plaintiff lumber company contracted with the contractor to furnish lumber. The Supreme Court of Oklahoma held that the lumber company became a subcontractor or submaterialman, quoting *Ryndak* v. *Seawell*, 13 Oklahoma 737 (1904), wherein the Supreme Court had said:

> "We think that when a materialman enters into a contract with a contractor to furnish material for a building which the contractor has agreed to build, and when the materialman has knowledge of

> such contract, and makes his contract in relation thereto, with the understanding that the material is to be used by the contractor in the building, he thereby becomes a subcontractor, within the meaning of the mechanic's lien law * * *."

In *City of Salem* v. *The Lane & Bodley Co.*, 189 Ill. 593, 599 (1901), the Illinois Supreme Court held that the plaintiff who had delivered an engine to the city for use in a building was a contractor within the meaning of the Lien Law.

In *Edinger Co.* v. *Hildreth Mem. U. E. Church*, 199 Iowa 1117, 1120 (1925), the plaintiff who had contracted to furnish stone to the contractor was held to be a subcontractor. The Iowa Supreme Court held that the word "subcontractor" under the mechanics' lien statute of Iowa included a materialman.

In *Anthony* v. *Dukes*, 130 Okla. 298 (1928), *Josey Oil Co.* v. *Ledden*, 162 Okla. 262 (1933) and *Standard Accident Insurance Co.* v. *Deep Rock Oil Corporation*, 180 Okla. 260 (1937), the Supreme Court of Oklahoma held that one who furnished material to a contractor was a subcontractor.

In *South Side Lumber Co.* v. *Date*, 156 Ill. App. 430, 438 (1910), certiorari denied by the Supreme Court of Illinois, a materialman furnishing material to a contractor was held to be a subcontractor.

In *Neary* v. *Puget Sound Engineering Co.*, 114 Wash. 1, 194 P. 830, a case on which petitioners rely, the Washington State Court recognized that there is no uniform rule with respect to the meaning of the word "subcontractor" and that in other jurisdictions the word has been construed to include persons who furnish material alone. The Supreme Court of Washington said:

> "In other jurisdictions, there may be other rules, but under the rule established in this State, Harmon was a materialman" (p. 8).

For every State Court case which petitioners may cite holding that one who contracts with the contractor to furnish material alone is not a subcontractor, respondent is able to cite a case holding that such a person is a subcontractor. Both the District Court and the Circuit Court decided that it would be futile to attempt to reconcile the hopelessly conflicting State Court decisions on this subject. As the Circuit Court said herein:

> "Nor do we feel it necessary to indulge in lingual gymnastics by losing ourselves in the labyrinth of divergent decisions which attempt to make a distinction (either practical or theoretical) between a 'subcontractor' and a 'materialman'. We cordially agree with the court below in that an effort to do so would only leave 'the searcher after truth in a state of unhappy confusion'. Cf. *McNab & Harlin Mfg. Co.* v. *Paterson Building Co.*, 72 N. J. Eq. 929, 67 Atl. 103 (1907), with *Northwest Roads Co., et al.* v. *Clyde Equipment Co.*, 79 F. (2d) 771 (C. C. A. 9th, 1935).
>
> • • • Inasmuch as there is no uniform rule on the subject, we are satisfied that Congress used the word 'subcontractor' in its broad, generic sense so as to include persons who have a contract to furnish building materials to a materialman. By so doing, instead of torturing the meaning of the disputed provision in section two of the Miller Act, we attempt to bring it into harmony with both the Congressional intent and the express wording of the remainder of the statute. Cf. *United States to the Use of Alexander Bryant Co.* v. *New York Steam Fitting Co.*, 235 U. S. 327 (1914); *Vermont Marble Co.* v. *National Surety Co.*, 213 Fed. 429 (C. C. A. 3d, 1914)" (R. 29).

Petitioners themselves in their own brief show that Congress must have intended to use the word "subcon-

tractor" in its generic sense in the proviso of Section 2(a) of the Miller Act (which is the only place in the Act where the word is used). The Senate and House Judiciary Committee reports, according to an extract quoted at page 22 of petitioners' brief, state that "A sub-subcontractor may avail himself of the protection of the bond by giving written notice to the contractor, but that is as far as the bill goes". A sub-subcontractor would be a subcontractor under a subcontractor. If the word "subcontractor" does not include persons who contract to furnish material alone, then a person who furnishes material to a subcontractor would not be a sub-subcontractor and could not recover on the bond, according to petitioners. But petitioners insisted in their brief to the Circuit Court of Appeals that a person who supplies material to a subcontractor can recover on the bond. Petitioners said:

> "It is only fair and reasonable that protection should be afforded to a materialman who furnishes materials to such a subcontractor * * *" (p. 14).

And in their brief here they rely on a statement by Representative Miller to the effect that materialmen who deal with subcontractors on public works can recover on the bond (p. 21).

Since petitioners claim that only a subcontractor or a sub-subcontractor may recover and at the same time claim that a person who furnishes material to a subcontractor may recover, it follows that petitioners consider a person who furnishes material to a subcontractor to be a sub-subcontractor, *i. e.*, a subcontractor under a subcontractor. And if petitioners consider one who furnishes material to a subcontractor to be himself a subcontractor, petitioners cannot consistently claim that one who furnishes material to a contractor is not also a subcontractor.

Petitioner Surety in this action admitted in its petition for a writ of certiorari in *Utah Construction Company* v. *United States*, 273 U. S. 745, 71 L. ed. 870 (1926) (in which case petitioner Surety herein was one of the defendants) that a contract to furnish material is "sometimes called a subcontract" (p. 7).

Thus, this Court, various State Courts, and even petitioners themselves have used the term "subcontractor" in its broad, generic sense to include persons having a contract to furnish material; and in that sense the Miller Company, which had a contract with the contractor to furnish material, was a subcontractor and respondent, which (as the District Court states) (R. 14) had a contract with the Miller Company to furnish material, was a sub-subcontractor, *i. e.*, a subcontractor under a subcontractor.

Respondent asks the Court to give to the word "subcontractor" as used in the proviso in Section 2(a) of the Miller Act the broad, generic meaning which this Court and Congress have given it. By so doing, the proviso will be brought into harmony with the purpose of the Act as expressed in its title and in its main provisions which state, without qualification, that all persons furnishing labor or material in the prosecution of the work may recover on the contractor's bond.

Petitioners, on the other hand, ask the Court to rephrase the proviso so that instead of providing, as it now does, that certain persons must give notice before suing, it shall provide that only those persons who have dealt with the contractor or a subcontractor may recover; and after thus rephrasing the proviso, petitioners ask the Court to make it still more restrictive of the persons who may recover by defining "subcontractor" narrowly and technically as a person who performs part of the contract at the site of the work. Petitioners' construction requires an amendment of the language of the proviso as

well as the rejection of the broad, generic meaning given the term "subcontractor" by this Court and various State Courts in connection with public works statutes. The result of this construction would be to bring the proviso into direct conflict with the title and the main provisions of the Act.

The Circuit Court of Appeals for the Third Circuit, construing the Heard Act, in *Vermont Marble Co.* v. *National Surety Co.*, 213 F. 429 (1914), has held that it would not construe a subsidiary provision of the Act so as to bring it in conflict with the general purpose and main provisions of the Act.

That Court said:

> "It is consistent with our respect for the legislative department, that we should not impute an intent to do indirectly what might better and more easily have been done directly, or by inconsistent provisions in the same statute, to accomplish a result by implication which contradicts the plainly expressed purpose of the act" (p. 434).

and further that;

> "The general purpose of the act thus clearly recognized, is not to be obstructed or deprived of its efficacy by a subsidiary provision in the same act, which, though presumably intended to increase and not diminish the protection given to the class of persons described, nevertheless, if construed as mandatory and jurisdictional, and not merely directory, seriously impairs the right conferred upon that class, and deprives persons furnishing materials and labor for the construction of public works, of the full measure of protection previously accorded them in the body of the act.

> It is to be observed that this provision as to publication of notice, is not an exception out of the general right accorded the persons for whose benefit the act was passed, but is a subsidiary provision, evidently meant to be consistent with the general intent of the act, and only by implication inconsistent therewith" (p. 434).

This Court approved the foregoing statement of the Circuit Court of Appeals in the following language in *United States of America for the Use and Benefit of Alexander Bryant Company* v. *New York Steam Fitting Company*, 235 U. S. 327, 59 L. ed. 253 (1914):

> "In *Vermont Marble Co.* v. *National Surety Co.*, 213 Fed. 429, the circuit court of appeals for the third circuit had occasion to pass upon the act of Congress under consideration. The court, Circuit Judge Gray speaking for it, decided against the contention now made by the Surety Company. The careful review and exposition of the statute there made leave little else to be said" (pp. 339, 258).

And this Court, speaking of conflicting and ambiguous provisions of the Heard Act, said:

> "In resolving the ambiguities in its provisions the court must endeavor to give coherence to them in order to accomplish the intention of Congress, and adapt them to fulfil its whole purpose."
>
> *Fleischmann Construction Company* v. *United States to the Use of Forsberg*, 270 U. S. 349, 360, 70 L. ed. 624, 631 (1926).

> "All laws are to be given a sensible construction; and a literal application of a statute, which would lead to absurd consequences, should be

avoided whenever a reasonable application can be given to it, consistent with the legislative purpose. See *Hawaii* v. *Mankichi*, 190 U. S. 197, 212, 47 L. ed. 1016, 1020, 23 Sup. Ct. Rep. 787, 12 Am. Crim. Rep. 465, and cases there cited. In ascertaining that purpose, we may examine the title of the act (*United States* v. *Fisher*, 2 Cranch, 358, 386, 2 L. ed. 304, 313; *United States* v. *Palmer*, 3 Wheat. 610, 631, 4 L. ed. 471, 477; *Church of the Holy Trinity* v. *United States*, 143 U. S. 457, 462, 36 L. ed. 226, 229, 12 Sup. Ct. Rep. 516), the source in previous legislation of the particular provision in question (*United States* v. *Saunders*, 22 Wall. 492, 22 L. ed. 736; *Viterbo* v. *Friedlander*, 120 U. S. 707, 30 L. ed. 776, 7 Sup. Ct. Rep. 962; *United States* v. *Morrow*, 266 U. S. 531, 535, 69 L. ed. 425, 427, 45 Sup. Ct. Rep. 173), and the legislative scheme or plan by which the general purpose of the act is to be carried out. See *Platt* v. *Union P. R. Co.*, 99 U. S. 48, 63, 64, 25 L. ed. 424, 429; *Bernier* v. *Bernier*, 147 U. S. 242, 246, 37 L. ed. 152, 154, 13 Sup. Ct. Rep. 244."

United States of America v. *Katz*, 271 U. S. 354, 357, 70 L. ed. 986, 988 (1926).

POINT II.

The bond given by petitioners on which this action was brought states clearly that it is for the protection of all persons supplying labor or material in the prosecution of the work.

The condition of petitioners' bond on which this action was brought is that defendant as "principal shall promptly make payment to all persons supplying labor and material

in the prosecution of the work provided for in said contract" (R. 17).

As the Circuit Court said herein:

> "* * * the only restriction or qualification in the bond itself, as in the Act, is that the person seeking a recovery must have supplied labor or material for the project" (R. 25).

The proviso in the second section (§270b) of the Miller Act as construed by petitioners would limit the persons who may recover on the bond to those having a direct contractual relationship with the contractor or a subcontractor, in the narrow, technical sense in which petitioners use that term, and would, therefore, be in conflict with the plain provisions of petitioners' bond.

POINT III.

The Circuit Court's construction of the Miller Act in this action follows the decisions of this Court construing the Miller Act and the earlier Heard Act which the Miller Act repealed.

The decisions of this Court construing the Heard Act hold that all persons, without qualification or restriction, furnishing labor or material in the prosecution of the public work may recover on the contractor's bond.

In *United States for the Use of Hill* v. *American Surety Company*, 200 U. S. 197, 50 L. ed. 437 (1906), this Court, construing the Heard Act, said:

> "There is no language in the statute nor in the bond which is therein authorized limiting the right of recovery to those who furnish material or labor directly to the contractor but all persons supplying

> the contractor with labor or materials in the prosecution of the work provided for in the contract are to be protected. The source of the labor or material is not indicated or circumscribed" (pp. 204; 441).

And earlier in its opinion in the same case, this Court said that in the construction of the obligation of the bond,

> "we must not overlook, in construing this obligation, the manifest purpose of the statute to require that material and labor actually contributed to the construction of the public building shall be paid for, and to provide a security to that end" (pp. 203; 440).

In *Illinois Surety Company* v. *John Davis Company*, 244 U. S. 376, 61 L. ed. 1206 (1917), this Court likewise stated that "the purpose of the act was to provide security for the payment of all persons who provide labor or material or public work" and that "the basis of recovery is supplying labor and material for the work" (pp. 380; 1211).

In *Fleischmann Construction Company* v. *United States of America to the Use of Forsberg*, 270 U. S. 349, 70 L. ed. 624 (1926), *supra*, this Court, again construing the Heard Act, said:

> "The purpose of the Materialmen's Act, which is highly remedial and must be construed liberally, is to provide security for the payment of all persons who supply labor or material in a public work, that is, to give all creditors a remedy on the bond of the contractor, to be enforced within a reasonable time in a single proceeding in which all claimants shall unite. *United States, ex rel., Alexander Bryant Co.*

> v. *New York Steam Fitting Co.*, 235 U. S. 327, 337, 59 L. ed. 253, 257, 35 Sup. Ct. Rep. 108; *Illinois Surety Co.* v. *John Davis Co.*, 244 U. S. 376, 380, 61 L. ed. 1206, 1211, 37 Sup. Ct. Rep. 614. In resolving the ambiguities in its provisions the court must endeavor to give coherence to them in order to accomplish the intention of Congress, and adapt them to fulfill its whole purpose" (pp. 360; 631).

The Heard Act expressly provided that the contractor's bond shall obligate the contractor or contractors to "promptly make payments to all persons supplying *him* or *them* with labor and materials in the prosecution of the work * * *." (Appendix B, p. 40; italics supplied.)

Under a strict interpretation of this language, a person could not recover under the Heard Act if he supplied labor or material to a subcontractor. He could recover only if he supplied labor or material to a contractor.

In fact, in some of the earlier decisions construing the Heard Act, Courts took that very position: that only those persons furnishing labor and material to the contractor could recover on the bond, and that persons dealing with a subcontractor (however defined) were not protected under a strict construction of the language of the Act.

> "Neither the Hurd Act nor the bond here given pursuant to its provisions expressly covers labor or materials furnished to a subcontractor or to any one other than the principal contractor. It was at first held under the act that the terms of the bond could not be enlarged by implication, and that one who furnished labor or material to a subcontractor had no right of action on the contractor's bond. *United States* v. *Simon* (C. C. A.) 98 F. 73; *United States* v. *Farley* (C. C.) 91 F. 474;

Mosier v. *Kurchhoff*, 51 Misc. 432, 101 N. Y. S. 643; see *United States to Use of Vermont Marble Co.* v. *Burgdorf*, 13 App. D. C. 506, at page 520. But it has been established since 1906 that, since the statute should be liberally construed with an eye to its purpose of protecting all who furnish labor or material for use in the construction or repair of government buildings and works, such persons are protected by the bond even though the labor and materials are supplied to a subcontractor, and although the bond expressly covers only labor and material furnished to the contractor. *United States to Use of Hill* v. *America Surety Co.*, 200 U. S. 197, 26 S. Ct. 168, 50 L. Ed. 437; *Mankin* v. *U. S. to Use of Ludowici-Celadon Co.*, 215 U. S. 533, 30 S. Ct. 174, 54 L. Ed. 315; *Utah Construction Co.* v. *United States* (C. C. A.) 15 F. (2d) 21; *Taylor* v. *Connett* (C. C. A.) 277 F. 945; *Smith* v. *Mosier* (C. C.) 169 F. 430; *Bartlett & Kling* v. *Dings* (C. C. A.) 249 F. 322; *cf. Pavarini & Wyne* v. *Title Guaranty & S. Co.*, 36 App. D. C. 348, Ann. Cas. 1912C, 367."

United States to Use of Galliher & Huguely, Inc., et al. v. *James Baird Co., et al.*, App. D. C., 73 F. 2d 652, 654 (1934).

In *United States for the Use of Hill* v. *American Surety Company*, 200 U. S. 197, 50 L. ed. 437 (1906) *supra*, and other cases decided by this Court, the claimant did not deal with the contractor. And yet, despite the language in the Heard Act that persons supplying the contractor might recover on the bond, this Court permitted persons supplying subcontractors to recover for the reason that they furnished labor or material in the prosecution of the work.

If this Court in the *Hill* case had followed the reasoning of petitioners in this case, this Court might have said: "The Heard Act provides that only persons dealing with the contractor may recover; this claimant did not deal with the contractor, therefore, this claimant cannot recover." This Court, however, held that the language of the Heard Act did not limit the right of recovery to those who furnished material or labor directly to the contractor but held that "the manifest purpose of the statute (is) to require that material and labor actually contributed to the construction of the public building shall be paid for, and to provide a security to that end".

> *United States for the Use of Hill* v. *American Surety Company*, 200 U. S. 197, 203, 50 L. ed. 437, 440 (1906), *supra*.

This Court construing the Heard Act has held that in no instance has this Court refused to allow any person to recover on the contractor's bond, who has actually furnished material for the performance of the public work where suit was brought within the prescribed period.

In *Illinois Surety Company* v. *John Davis Company*, *supra*, 244 U. S. 376, 61 L. ed. 1206 (1917), *supra*, this Court, construing the Heard Act, said:

> "In every case which has come before this court, where labor and materials were actually furnished for and used in part performance of the work contemplated in the bond, recovery was allowed, if the suit was brought within the period prescribed by the Act" (pp. 380; 1211).

In *Utah Construction Company* v. *United States*, 9 Cir., 15 F. 2d 21 (1926), certiorari denied, 273 U. S. 745,

71 L. ed. 870, the United States entered into a contract with the Utah Construction Company as contractor for the construction of a weir. The contractor entered into a contract with Wattis-Samuels Company to furnish all material necessary to do certain concrete work. Wattis-Samuels Company made a contract with one Paul under which Paul agreed to sell and deliver the sand and gravel required. Paul hired three different concerns—Lindstrom, Daniel Contracting Company and Henry C. Peterson, Inc. —to furnish their several tugboats and lighters for the transportation of the sand and gravel to the site of the project.

Lindstrom and the Daniel and Peterson companies were not paid and sued to recover on the contractor's bond, the action being brought in the name of the United States to the Use of Lindstrom, with the Daniel and Peterson companies as interveners.

The defendant Aetna Casualty and Surety Company, the surety in that case as in the present case, and its principal, the contractor, contended that Lindstrom and the Daniel and Peterson companies could not recover on the contractor's bond under the Heard Act because they were not persons supplying materials to the contractor or even to a subcontractor. The defendants contended that Paul, who hired Lindstrom to tow the lighters of the Daniel and Peterson companies for the transportation of the sand and gravel, was not a subcontractor but at best a materialman who sold materials to Wattis-Samuels Company, which had contracted with the contractor to furnish them. In other words, the defendants contended that Lindstrom and the Daniel and Peterson companies could not recover because they had been employed by a materialman and not by a contractor or subcontractor.

The Circuit Court was thus called upon to decide whether under the Heard Act persons who were employed by a materialman who furnished material to another per-

son who finally furnished them to the contractor could recover on the contractor's bond.

The Court held that such persons were protected under the Heard Act and allowed Lindstrom and the Daniel and Peterson companies to recover on the bond. The Court said:

> "The argument that Paul was only a vendor of material to a subcontractor and that those whom he employed (Lindstrom and the Daniel and Peterson companies) cannot avail themselves of the protection of the bond, is too restrictive of the language of the statute" (p. 24).

The Court held that Lindstrom and the Daniel and Peterson Companies could recover whether Paul, by whom they were employed, was called a materialman or a subcontractor. The Court said:

> "But as he (Paul) did supply material and labor which were used, whether he be called a materialman or a subcontractor supplying labor is not of vital importance, for the statute is broad enough to afford protection to him and the relator (Lindstrom)" (p. 24).

The Court thus held that under the Heard Act any person furnishing labor or material in the prosecution of the work could recover on the contractor's bond, whether the person to whom they were furnished was a subcontractor or materialman.

Petitioners admit that "That case (*Utah Construction Co.* v. *United States*) purportedly stands for the proposition that, under the Heard Act, a vendor to a materialman is protected" (Brief, p. 19).

In fact, the Circuit Court in that case held that employees of a materialman who furnished material to another

person who finally furnished them to the contractor, could recover on the contractor's bond.

The defendants, in *Utah Construction Company* v. *United States, supra,* applied to this Court for a writ of certiorari, repeating the arguments advanced by them in the Circuit Court of Appeals. In their brief to this Court in support thereof, the defendants stated "that the liability under the bond extended only to those who had supplied it (the contractor) or its subcontractor, with labor or material and not to those who supplied labor or materials to a materialman" (p. 15). In their petition they argued that the Heard Act was not intended to inure to the benefit of such persons as Lindstrom and the Daniel and Peterson Companies but only "to those supplying the contractor (directly or through one to whom he has let the work), with labor and material" (p. 5).

Petitioners in their brief in that case (pp. 26-27) predicted that the Circuit Court's decision would result in dire consequences as follows:

> "If the view of the Circuit Court of Appeals (in the *Utah Construction Company* case) is correct, it must necessarily follow that a contractor could not, in safety, so much as purchase a keg of nails and pay for it without first satisfying himself at his own risk that the drayman who hauled it to the job of the vendor had been paid for his services, and that the wholesaler from whom the vendor purchased it had likewise been paid."

This Court denied the petition for a writ of certiorari.

> *Utah Construction Co.* v. *United States*, 273 U. S. 745, 71 L. ed. 870 (1927).

The decisions of this Court construing the Heard Act and the Miller Act have held that under the Heard Act

the basis of recovery on the contractor's bond is supplying labor and material for the work; that "in every case which has come before this Court, where labor and materials were actually furnished for and used in part performance of the work contemplated in the bond, recovery was allowed, if the suit was brought within the period prescribed by the Act" (*Illinois Surety Company* v. *John Davis Company, supra*); and that the Miller Act enlarges the protection given under the Heard Act and, like it, is highly remedial and to be liberally construed.

Petitioners state that "the decisions in the state courts (construing state public works statutes) have advanced several reasons for denying relief to vendors of materialmen under public work statutes" (Brief, p. 39). Not one of the cases cited by petitioners involved a statute essentially the same as the Miller Act. Two of these cases—*Ewen* v. *Thompson-Starrett Company*, 208 N. Y. 245 and *Bohnen* v. *Metz*, 126 App. Div. 807, aff'd 193 N. Y. 676—involved a section of the New York State Labor Law; another—*Huddleston* v. *Nislar*, 72 S. W. (2d) 959 (Texas)— involved a Texas Lien Law. In this connection, the Court will note that the New York Court of Appeals in a fragment from its opinion quoted by petitioners (Brief, p. 15) was not referring by the word "Act" to the Miller Act or the Heard Act, but to a section of the New York Labor Law.

Of the cases cited by petitioners involving public works statutes (including *Neary, et al.* v. *Puget Sound Engineering Co., et al.*, 114 Wash. 1, 194 Pac. 830, *supra*, construing the Washington public works statute, on which the District Court relied), not one contains the plain language of the Miller Act that all persons furnishing labor or material in the prosecution of the public work may recover.

For every case which petitioners have cited holding that a materialman who supplies a materialman cannot

recover under a public works bond given pursuant to a state statute, respondent is able to cite a case holding that such a person can recover.

City of Portland v. *New England Casualty Co.*, 78 Oregon 195, 152 P. 253 (1915);
American Guaranty Co. v. *Cincinnati Iron & Steel Co.*, 115 Ohio State 626, 155 N. E. 389 (1927);
French v. *Powell*, 135 Cal. 636, 68 P. 92 (1902);
Gilmore v. *Westerman*, 13 Wash. 390, 43 P. 345 (1896);
People v. *U. S. Fidelity & Guaranty Co.*, 263 Mich. 638 (1933);
Cf. Williamson v. *Williams*, 262 Mich. 401, 247 N. W. 704 (1933).

As the Circuit Court herein said of cases involving public works statutes:

> "The Court below relied heavily on a number of decisions construing state public work statutes. These authorities, of course, are not binding on us in the interpretation of federal legislation, and at best they are deceptive since the purpose, scope and terms of the state enactments are so varied and so different from the act under consideration" (R. 28-29).

POINT IV.

This Court's liberal construction of the Heard Act has not resulted in, and the Circuit Court's similar construction of the Miller Act will not result in, the consequences feared by petitioners.

In 1935, when Congress passed the Miller Act repealing the Heard Act, Congress knew that this Court, in construing the Heard Act, as far back as 1906 had said that: "we must not overlook, in construing this obligation, the manifest purpose of the statute to require that material and labor actually contributed to the construction of the public building shall be paid for, and to provide a security to that end" (*United States for the Use of Hill* v. *American Surety Company*, 200 U. S. 197, 203; 50 L. ed. 437, 440, *supra*). Congress knew that this Court, in construing the Heard Act in 1917, had held that "the purpose of the act was to provide security for the payment of all persons who provide labor or material on public work" and that "the basis of recovery is supplying labor and material for the work" (*Illinois Surety Company* v. *John Davis Company*, 244 U. S. 376, 380, 61 L. ed. 1206, 1211, *supra*).

Congress also knew that the Circuit Court of Appeals for the Ninth Circuit, in construing the Heard Act in 1926, had held that the Act was broad enough to protect a claimant who had supplied material to the vendor of material to a contractor and that this Court had denied certionari in that case (*Utah Construction Company* v. *United States*, 15 F. 2d 21, cert. denied, 273 U. S. 745, 71 L. ed. 870, *supra*).

If the Heard Act as construed by this Court and the Circuit Court of Appeals had been "impracticable" and "unworkable" and had resulted in increased costs to the Government as well as the contractor, and in "hardship,

injustice and absurdity, not only from the viewpoint of the contractor but also of the Government" (Petitioners' Brief, p. 17), these results would have become apparent to Congress during the twenty-nine years that had elapsed between 1906, when this Court decided *United States for the Use of Hill* v. *American Surety Company, supra* and 1935, when Congress passed the Miller Act. And it is inconceivable that, if any such results had followed this Court's liberal construction of the Heard Act, Congress would have substituted for the Heard Act the Miller Act which this Court has held was intended to enlarge the protection given laborers and materialmen under the Heard Act.

> *United States to the Use of Noland Company, Inc.* v. *Irwin*, 316 U. S. 23, 29, 86 L. ed. 1241, 1245 (1942).

With the experience of almost thirty years under this Court's liberal construction of the Heard Act, Congress enacted the Miller Act, giving even more liberal protection to laborers and materialmen than did the Heard Act: where the Heard Act provided that persons furnishing labor or materials in the prosecution of public work to the *contractor* might recover, the Miller Act provides that all persons furnishing labor or material in the prosecution of public work may recover on the contractor's bond.

At the time Congress was considering a new act to repeal and supersede the Heard Act, Congress had before it various bills on the general subject of bonds for the protection of laborers and materialmen. It was to this assortment of bills, and not to the meaning of any particular bill, that the statement of Representative Miller quoted in petitioners' brief, page 20, referred. Two of these bills, H. R. 2068 and H. R. 6677, contained a proviso of the kind which the Circuit Court in this case defines as "an

exception, which exempts absolutely from the operation of a statute" (R. 28). The proviso was negative in form and expressly *denied* the right of recovery to certain persons. The Committee of the House in charge of the bills rejected H. R. 2068, and H. R. 6677 and reported out H. R. 8519 (which became the Miller Act) in which the proviso in the second section is, in the words of the Circuit Court in this case, "essentially an *explanation*—to make clear (what was not clear under the prior Heard Act) that the absence of direct contractual relationship with the general contractor should not defeat actions on the payment bond. * * * The provision came not to destroy but to fulfill; to give more abundant life to the broad sweep of an admittedly beneficent remedial statute" (R. 28).

Senator Burke summed up the intent of Congress in passing the Act in the following statement:

> "Mr. President, this bill proposes to amend what is known as the 'Heard Law'. * * * This bill would amend that law by requiring an additional bond, a payment bond, for the protection of material men and laborers, subcontractors, and all who put forth their labor or furnish materials or incur expenditures in connection with the work."
>
> Vol. 79 Congressional Record, Part 12, page 13382, Senate proceedings, 74th Congress, 1st Session (H. R. 8519).

As this Court and other courts have pointed out, it is a simple matter for the contractor himself to guard against such consequences as petitioners state they fear.

In *United States for the Use of Hill* v. *American Surety Company* (1906), *supra*, this Court said:

> "We cannot conceive that this construction works any hardship to the surety. The contractor gets the

> benefit of such work or material. It is distinctly averred in this case that the original contractor received the benefit of the work done, and it was used in part performance of his contract. It is easy for the contractor to see to it that he and his surety are secured against loss by requiring those with whom he deals to give security by bond, or otherwise, for the payment of such persons as furnish work or labor to go into the structure'' (pp. 204; 441).

To the same effect is the later decision of this Court in *Mankin* v. *United States to the Use of Ludowici-Celadon Co.*, 215 U. S. 533, 540, 54 L. ed. 315, 318 (1910), *supra*.

In *City of Portland* v. *New England Casualty Co.*, 78 Oregon 195, 152 P. 253 (1915), *supra*, a truckman engaged by a sub-subcontractor with whom neither the contractor nor the first contractor had dealt was permitted to recover on the contractor's bond. The defendants in that case advanced substantially the same argument as to consequences as is now advanced by petitioners. The Supreme Court of Oregon said:

> "In order to free himself from liability on the bond for material or labor furnished, the act, in effect, imposes upon a contractor the duty of seeing that the persons who furnish the material and perform the labor in the furtherance of the contract are paid. This would not seem to work any hardship upon the contractor or his surety, for, if he does not care to ascertain who actually supplies the labor and materials, he can require that the subcontractor indemnify him with proper security'' (p. 201).

A contractor can also protect himself against the consequences feared by petitioners by exercising care in

selecting the persons with whom he deals, by requiring from such persons, before paying them, affidavits that all labor and material furnished by or through them have been paid for, and by withholding all or part of the payment due such persons until the 90 days in which notice of claims must be given to the contractor under the Miller Act have elapsed.

If the contractor fails to protect himself and contracts with financially irresponsible persons, he may not defeat recovery by a claimant on the contractor's bond on the ground that he has already paid such persons. This Court, in *Illinois Surety Co.* v. *John Davis Co.*, 244 U. S. 376, 380, 61 L. ed. 1206, 1211 (1917), *supra*, has said:

> "As the basis of recovery is supplying labor and material for the work, he who has supplied them to a subcontractor may claim under the bond, even if the subcontractor has been fully paid. *Mankin* v. *United States*, 215 U. S. 535, 54 L. ed. 315, 30 Sup. Ct. Rep. 174."

In *Mankin* v. *United States for the Use of Ludowici-Celadon Co.*, 215 U. S. 533, 54 L. ed. 315 (1910), *supra*, the use plaintiffs were permitted to recover an amount in excess of the balance owing from the contractor to the subcontractor.

In *Seaboard Surety Company* v. *Standard Accident Insurance Company*, 277 N. Y. 429 (1938), the New York Court of Appeals said:

> "The Hurd (Heard) Act requires any person contracting to do public work for the United States to execute a bond not only for completion but also conditioned on prompt payment of all persons supplying labor and materials in the prosecution of the work. It has been held that a materialman

may recover on the bond of the general contractor, even though he supplied material to the subcontractor and even though the subcontractor has already been paid in full. (*Hill* v. *American Surety Co.*, 200 U. S. 197; *Mankin* v. *Ludowici-Celadon Co.*, 215 U. S. 533. See *Illinois Surety Co.* v. *Davis Co.*, 244 U. S. 376, 380.)" (p. 433).

CONCLUSION.

The order of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

BENJAMIN P. DEWITT,
Counsel for Respondent.

SIDNEY PEPPER,
Of Counsel.

APPENDIX A.

The Miller Act.

An Act Requiring Contracts for the Construction, Alteration, and Repair of Any Public Building or Public Work of the United States to Be Accompanied by a Performance Bond Protecting the United States and by an Additional Bond for the Protection of Persons Furnishing Material and Labor for the Construction, Alteration, or Repair of Said Public Building or Public Work.

49 Stat. at L. 793, Act Aug. 24, 1935, c. 642, §1, 40 USCA §270a. **Bonds of contractors for public buildings or works; waiver of bonds covering contract performed in foreign country.**

(a) Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such persons shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. When-

ever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section.

49 Stat. at L. 794, Act Aug. 24, 1935, c. 642, §2, 40 USCA §270b. **Same; rights of persons furnishing labor or material.**

Sec. 2. (a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum

or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelop addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the date of final settlement of such contract. The United States shall not be liable for the payment of any costs or expenses of any such suit.

40 Stat. at L. 794, Act Aug. 24, 1935, c. 642, §3, 40 USCA §270c. **Same; right of person furnishing labor or material to copy of bond.**

Sec. 3. The Comptroller General is authorized and directed to furnish, to any person making application

therefor who submits an affidavit that he has supplied labor or materials for such work and payment therefor has not been made or that he is being sued on any such bond, a certified copy of such bond and the contract for which it was given, which copy shall be *prima facie* evidence of the contents, execution, and delivery of the original, and, in case final settlement of such contract has been made, a certified statement of the date of such settlement, which shall be conclusive as to such date upon the parties. Applicants shall pay for such certified copies and certified statements such fees as the Comptroller General fixes to cover the cost of preparation thereof.

49 Stat. at L. 794, Act Aug. 24, 1935, c. 642, §4, 40 USCA §270d. **Same; definition of "person" in sections 270a, 270b and 270c.**

Sec. 4. The term "person" and the masculine pronoun as used in sections 270a, 270b and 270c of this title shall include all persons whether individuals, associations, copartnerships, or corporations.

Sec. 5. This act shall take effect upon the expiration of sixty days after the date of its enactment, but shall not apply to any contract awarded pursuant to any invitation for bids issued on or before the date it takes effect, or to any persons or bonds in respect of any such contract. The act entitled "An Act for the protection of persons furnishing materials and labor for the construction of public works," approved August 13, 1894, as amended (U. S. C. title 40, sec. 270), is repealed, except that such Act shall remain in force with respect to contracts for which invitations for bids have been issued on or before the date this Act takes effect, and to persons or bonds in respect of such contracts.

APPENDIX B.

The Heard Act.

(Repealed by the Miller Act, §5.)

40 USCA §270 (Aug. 13, 1894, c. 280, 28 Stat. at L. 278; Feb. 24, 1905, c. 778, 33 Stat. at L. 811; Mar. 3, 1911, c. 231, §291, 36 Stat. at L. 1167). **Bonds of contractors for public buildings or works; right of persons furnishing labor and materials.**

Any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; and any person, company, or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States. If the full amount of the liability of the surety on said bond is insufficient to pay the full amount of said claims and demands, then, after paying the full amount due the United States, the remainder shall be distributed *pro rata* among said interveners. If no suit should be brought by

the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit to the department under the direction of which said work has been prosecuted that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the United States in the District Court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution: *Provided,* That where suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later: *And provided further,* That where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract, and not later. If the recovery on the bond should be inadequate to pay the amounts found due to all of said creditors, judgment shall be given to each creditor *pro rata* of the amount of the recovery. The surety on said bond may pay into court, for distribution among said claimants and creditors, the full amount of the sureties'

liability, to wit, the penalty named in the bond, less any amount which said surety may have had to pay to the United States by reason of the execution of said bond, and upon so doing the surety will be relieved from further liability: *Provided further*, That in all suits instituted under the provisions of this section such personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation, published in the State or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor.